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NEC: CAN YOU BE TIME-BARRED FROM MAKING YOUR CLAIM UNDER THE NEC IF THE ADJUDICATOR IS NOT APPOINTED WITHIN 4 DAYS?

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Different contractual arrangements for construction contracts require different dispute resolution processes. This is therefore, not a "one size fits all" situation. So for example, under the FIDIC Red Book, where the employer is responsible for the design, the contract makes provision for a Standing DAB. Conversely, under the FIDIC Yellow Book, where the contractor carries design responsibility, the contract makes provision for an Ad Hoc DAB to be appointed.

Although there has been some conjecture over the years as to whether the NEC ECC required a standing DAB or an Ad Hoc DAB, this matter has now been settled following the judgement in *Transnet Soc. Limited v Group Five Construction (Pty) Ltd., and others (7848/2015) [2016] ZAKZDHC 3 (9 February 2016)* in which matter it was decided that the NEC ECC made provision for Ad Hoc Adjudicators to be appointed.

The standard form of the NEC Contract Data (provided by the Employer) provides for the appointment of the Adjudicator at the time of the contract. Here, however, in the case under discussion, the defendant made provision for the appointment of an Adjudicator only *in the event of a dispute arising*. The courts conclusion, however was that the nature and jurisdiction of the Adjudicator (being an Ad Hoc rather than a Standing DAB) was not affected by the manner and timing of the Adjudicators appointment.

This outcome, it has to be said, is somewhat surprising given the very stringent time barring provisions of NEC Option W1 clause W1.3 (2) which prevent any further recourse to any form of dispute resolution where the time constraints have not been complied with.

If there is any delay, therefore, in agreeing or appointing the Adjudicator, a claiming party might be left in limbo, without anyone to make a submission to and a situation where it may be argued that it is out of time and time barred. This argument has been adopted on a number of occasions by some of our major employer bodies.

Let's paint the picture. In most instances anticipated by the Adjudication Table, the claimant has to notify the dispute within four weeks after the claiming party becomes aware of the action or dispute event. Between not earlier that 14 days and not later than 28 days after the notification of the dispute the claiming party must submit its referral document to the Adjudicator.

Clause 11 W1.1 read together with the special Z clause, provides that "*The Adjudicator is…… to be appointed under the NEC 3 Adjudicator's Contract (June 2005) if and when a dispute arises"*. The dispute arises when the claimant notifies the dispute in accordance with the Adjudication Table. So at the same time as the claimant (or shortly thereafter) notifies the dispute we would expect him to submit the names of prospective DAB members to the defending party for their consideration and, hopefully, approval.

It also must be said that we are working in a very adversarial environment and mutual consensus is in short supply. So, almost on principle, the defending party will not agree with the claimants' DAB proposals. So either a process of tit for tat then ensues or no response is received. Eventually, efforts to reach agreement are abandoned and the Adjudicator nominating body is approached to make the appointment.

Clause W1 (3) contains an undertaking to make these appointments within four days of receiving the request. Bearing in mind that the Adjudicator nominating body is not a party to the Contract, we are on somewhat tenuous grounds here. Reality is a bit different therefore and appointments can take weeks rather than days to put in place.

Other things can also go wrong. MDA recently had an instance where the Adjudicator Nominating body was using an out of date e-mail address for the Adjudicator and a six-week delay in making the appointment ensued.

So it is very likely by the time that the Adjudicator is actually appointed, that the referral period (of between 14 and 28 days) will have expired. What is the claimant to do in these circumstances?

The times for notifying and referring a dispute may be extended by the Project Manager if the Contractor and the Project Manager agree to the extension before the notice or referral is due. In the environment described above, any such agreement will in all likelihood not be forthcoming. As an example of this, what might be perceived as uncooperative behaviour, see the case of *Sasol Chemical Industries Ltd., v Peter Odell and Another (401/2014) [2014] ZAFSHC 11 (20 February 2014)* a request to extend the period for providing information was denied by the claiming party.

It is important to note that when the referring party submits its' referral document, it must make that submission to an entity. It cannot make a submission to an entity yet to be identified and appointed.

It therefore makes good sense that the time-periods applicable to the referral of disputes to the Adjudicator only commence running once the Adjudicator is chosen and appointed.

In considering this conclusion, it is important to note the following:

- The appointment of the adjudicator is a joint act by the parties,

- The appointment only takes place in the event of a dispute; until then, there is no appointment or need for the parties to act jointly; and No time period is set for the parties to complete their joint act of appointment. Where no time is set for performance, performance must take place within a reasonable period of time.

If the parties have not chosen an adjudicator, *either* party may ask the Adjudicator nominating body to choose one. The Adjudicator nominating body chooses an adjudicator within 4 days of the request. But, obviously, the Adjudicator nominating body, who is not a party to the contract, is neither obliged to nominate the adjudicator, or to do so within the 4-day period agreed by the parties.

There is good legal support for the argument that Contracts must be interpreted in such a way *as to allow for business efficacy*[1]. In addition, an interpretation will not be followed if it would make a mockery of the contract.

Where the Adjudicator is agreed at the commencement of the contract, the claimant has the full period provided for to refer the disputes to the Adjudicator. It should not be any different where the parties have not agreed to the adjudicator at the time of the contract. To suggest otherwise would be inequitable, inconvenient and impractical, and would severely curtain the *"availability of the opportunity to exercise the right to [arbitral] redress"* on the part of the claimant.

Because there is no time-period set as to when the Adjudicator will be appointed in the event of a dispute by the parties acting jointly or by reference to the Adjudicator nominating body, it must follow that the time-bar clause cannot begin to operate until he has been appointed.

Such an interpretation, makes provision for business efficacy**.** Any other construction would be absurd. If an Adjudicator is not appointed prior to the expiry of a four-week period, the claimant loses it's right to the dispute resolution procedure agreed to. The defendant could refuse to agree to act jointly in appointing the Adjudicator, or could simply frustrate and delay the process. The Adjudicator nominating body could fail to act or delay in doing so. It is not contractually bound to do anything; the parties have no enforceable rights against it.

A necessary ingredient of the swift adjudication process is certainty. Parties need to know where they stand, who must do what, and by when. The dispute resolution process needs to be sensibly operated and the failure to appoint an Adjudicator within the period for referral to him should not invalidate the adjudication process.

Accordingly, the period for referral by the claiming party commences from when the Adjudicator has been appointed and the Adjudicator Contract has been signed by all Parties.

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[1]Contracts must be interpreted in such a way ***as to allow for business efficacy***. *Cargo Africa CC v Gilbeys Distillers & Vintners (Pty) Ltd* 1998 4 SA 355 (N) 368G (taking as the starting point of the interpretation the fact "*that the parties intended their agreement to make good business sense*")